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Supreme Court, U.S.
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CASE NO. 93-7407

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

RESPONSE REQUESTED

ROBERT O'NEAL,

Petitioner,

v.

FRED McANINCH, WARDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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OPINION BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported at O'Neal v. Morris, 3 F.3d 143 (6th Cir. 1993) and is reproduced in the Appendix to Petitioner's certiorari petition at A-1. The entry of the Court of Appeals denying rehearing and rehearing en banc is reproduced in the Appendix to Petitioner's certiorari petition at A-8.

The judgment and opinion of the United States District Court

[1]Terry Morris, the original Respondent in this action, is no longer employed in the Chillicothe Correctional Institution. Fred McAninch, the current Warden of the Chillicothe Correctional Institution, is thus the proper Respondent in this action.

for the Southern District of Ohio, Western Division, is unreported and reproduced in the Appendix to Petitioner's certiorari petition at A-9. The Magistrate Judge's Supplemental Report and Recommendation is unreported and reproduced in the Appendix to Petitioner's certiorari petition at A-14. The district court's original remand order is unreported, and reproduced in the Appendix to Petitioner's certiorari petition at A-23. The Magistrate Judge's Report and Recommendation is unreported and reproduced in the Appendix to Petitioner's certiorari petition at A-28.

STATEMENT OF THE CASE

Respondent Fred McAninch (hereinafter Respondent) is the Warden of the Chillicothe Correctional Institute located in Chillicothe, Ohio. As the Warden, Respondent has custody of Petitioner Robert O'Neal, (hereinafter Petitioner). This custody is maintained pursuant to the journal entry of sentence issued by the Court of Common Pleas of Cuyahoga County in the case of State v. O'Neal, CR-163540 (CCP Cuy.Cty. 1981), wherein Petitioner was indicted and found guilty after a jury trial of one (1) count of aggravated murder in violation of Ohio Revised Code Section 2903.01, one (1) count of robbery in violation of Ohio Revised Code Section 2911.01,and one (1) count of kidnapping in violation of Ohio Revised Code Section 2905.01. Upon conviction the trial court sentenced Petitioner to consecutive terms of life imprisonment on the aggravated murder conviction, seven (7) years to twenty-five (25) years imprisonment on the aggravated robbery conviction and seven (7) years to twenty-five (25) years imprisonment on the kidnapping conviction.

Petitioner appealed the decision of the trial court to the Court of Appeals of Ohio for the Eighth Appellate District alleging through counsel the following assignments of error:

1. The appellant was denied a fair trial and his right to trial by a jury drawn from a representative cross-section of the community when the state used its preemptory challenges to remove prospective jurors on the sole ground of group racial bias.

2. The appellant was denied his constitutional right to a fair trial by the admission of gruesome, inflammatory photographs.

3. The appellant was denied his right to a fair trial and his right to confront and cross-examine an adverse witness when the trial judge permitted an FBI agent to refuse to answer questions directed at him under cross-examination.

4. The court erred in permitting the introduction of evidence of other crimes, wrongs or acts.

5. The appellant was denied a fair trial by the court's instructions on complicity and conspiracy.

6. Trial court erred in overruling the motion for separate trial.

On January 25, 1985, the Court of Appeals affirmed in all respects. A subsequent motion for leave to appeal was denied by the Ohio Supreme Court on January 29, 1986.

Petitioner filed an application for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 in the United States District Court for the Southern District of Ohio, Western Division, alleging the following grounds for relief:

1. Petitioner could not be jointly tried absent strict compliance with Criminal Rule 14 and O.R.C. §2945.20.

2. The prosecutor exercised his (preemptory) challenges to excuse jurors solely on the basis of their racial affiliation.

3. Petitioner was denied the right to a fair trial by improper jury instructions by the trial court.

4. Petitioner was denied the right to a fair trial and due process by continued reference to conspiracy and the trial court instruction on conspiracy.

5. Petitioner was denied due process and the right to a fair trial by deliberate prosecutorial misconduct.

6. Petitioner was denied his right to a fair trial and his right to confront and cross-examine an adverse witness.

7. Petitioner was deprived of his due process rights to a fair trial by the trial court allowing inflammatory physical evidence to be viewed by the jury.

8. Petitioner was denied equal protection of the law where the appellate court did not address an issue raised on appeal by Petitioner.

After the filing of extensive pleadings as well as an evidentiary hearing, and oral argument, the Magistrate Judge issued a Report and Recommendation on January 19, 1992. Respondent filed untimely objections to the Report and Recommendation on February 19, 1992. The district court thereafter granted a Petitioner motion to strike and remanded the case to the Magistrate Judge on the claims of constitutionally defective jury instructions, prosecutorial misconduct and erroneously admitted evidence.

The Magistrate Judge then filed a Supplemental Report and Recommendation which recommended granting the writ of habeas corpus. Although timely objections to the Magistrate Judge's Supplemental Report were thereafter filed, on June 26, 1992 the district court adopted the Magistrate Judge's Supplemental Report in its entirety and conditionally granted Petitioner's habeas corpus petition.

Respondent next obtained a stay of the district court's judgment and perfected a timely appeal to the Sixth Circuit Court of Appeals. On May 6, 1993, the Sixth Circuit issued a unanimous opinion reversing the district court's writ granting decision.

O'Neal v. Morris, 3 F.3d 143 (6th Cir. 1993). In so ruling the Sixth Circuit held that since all evidence upon which the jury could have relied pointed to Petitioner's guilt as a principal, error, if any, in the trial court's jury instructions was harmless. It is significant that the Sixth Circuit did not hold, as Petitioner mistakenly claims, "that the constitutional and nonconstitutional error findings made by the lower courts were correct." (Petitioner certiorari petition, p. 6). Indeed to the contrary, the Sixth Circuit explicitly recognized that the trial court's instructions were not error of any kind as it held:

> when read against the background of Ohio complicity law, the court's reference to "defendant's or co-defendant's or aiders and abettors" appears to be nothing more than an unartful boilerplace reiteration that the same individuals could be found guilty as either principals ("defendants or co-defendants") or as "aiders and abettors".

Id. at 146.

In response to the Sixth Circuit's decision, Petitioner filed a petition for rehearing with suggestion for en banc rehearing. The Sixth Circuit denied Petitioner's motion on October 4, 1993. Petitioner has now filed a timely petition for writ of certiorari in this Court.

STATEMENT OF THE FACTS

The plot to kill Henry Podborny, (hereinafter Henry) began as a confidence game to bleed money from Henry's wife, Dimple Podborny (hereinafter Dimple). In the spring of 1980, Dimple asked her daughter-in-law, Lola Gail Toney (hereinafter Toney) if Toney knew someone who could provide "protection" from Henry. (Tr. 1763). After meeting with Dimple in Chicago, Toney returned to Cleveland where she contacted her long time friend and business associate, James McLean. (Tr. 1764, 2946). Toney and McLean met three times and devised a plan to extort money from Dimple by charging her for "protection" from Henry. (Tr. 1769).

In June, 1980, Dimple met with Toney, McLean and another daughter at a Cleveland area Holiday Inn. Dimple agreed to a $5,000 protection fee of which she paid $2,500. In the months that followed, Toney and McLean concentrated on milking Dimple for "protection" money, rather than harming Henry. By mid-August, 1980, Dimple was anxious for results and approached Toney to arrange for Henry's killing. (Tr. 2952). Soon thereafter, Dimple paid Toney $24,600.

In August of 1980, Petitioner, who had known Toney over the previous eight years as a lover and part-time bookkeeper, entered the scheme. (Tr. 1750). Petitioner's job, for which Toney paid him $6,500, was to accompany Toney to Chicago to soothe Dimple's fears and convince her that plans for Henry's death were being made. (Tr. 1809, 1818, 1820). In the months that followed Petitioner and Toney were in constant contact. (Tr. 1823).

By January of 1981, Dimple had become very impatient. A plan was then devised to lure Henry to Cleveland, where Toney would drop him off at Petitioner's restaurant. Petitioner agreed to hold Henry while Toney and others went to Chicago and robbed Henry's residence.

On January 6, 1981, Petitioner received a .38 caliber Smith and Wesson gun which belonged to him and had been confiscated earlier in East Cleveland.[2] (Tr. 4051). Thereafter, on January 29, 1981, the robbery conspiracy proceed as planned and Toney took Henry to Petitioner's bar and drove down the block to a gas station as prearranged with Petitioner. (Tr. 1858). Approximately 10 minutes later, Petitioner arrived at Toney's car and gave her Henry's keys and wallet. (Tr. 1859). Petitioner and Toney drove up the block where they were met by another accomplice (Lloyd Allen) who informed them that he had hit Henry with a lead pipe so he couldn't run.

Henry was never seen alive again. His body was ultimately found on April 23, 1981. It was undisputed that Henry's death was caused by five blows to the head with a blunt instrument and a shot in the forehead. (Tr. 3710-3712).

Subsequent to Henry's murder, Toney, McLean and others attempted to get at Henry's assets. By February of 1981, however, McLean agreed to cooperate with the FBI who had earlier arrested

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[2] Later tests confirmed that Henry was shot by a .38 caliber bullet. (Tr. 3893).

him. From March 17, 1981 through March 25, 1981, McLean, with the help of the FBI, taped several conversations with Toney in which they discussed Petitioner's extortion of money from Toney. (Tr. 1939, 3064, 3068, 3111). At the FBI's suggestion, McLean offered to help Toney get money. In a series of taped conversations, Toney and McLean arranged and delivered approximately $500 to Petitioner. (Tr. 1939).

On March 25-26, 1981, Toney, her brother Gary, Allen and Petitioner were arrested. Allen made a written statement which implicated Petitioner and himself in the kidnapping and robbery, but denied any involvement in Henry's death. (Tr. 4446, 4447, 4458-4461). After he was advised of his rights Petitioner made an oral statement similar to Allen's. (Tr. 4464, 4465).

Petitioner was further implicated in Henry's murder by admissions which he made to Wilbur Higgins during an April 2, 1981 Cuyahoga County Jail visit. Although it would be weeks before the police would find Henry's body, Petitioner confessed to Higgins that he and Allen had killed a man and placed the body in the field next to 1150 Lakeview. (Tr. 3724-3728). Petitioner then told Higgins to cover up the body. Despite Petitioner's request, Higgins did not go to the body until weeks later when he was accompanied by a city health inspector.

Higgins also testified that earlier that winter, Petitioner and Allen were parked within twelve feet of where Henry's body was found. At that time Petitioner told Higgins to leave for a while using the false excuse that they had women in the car. (Tr. 3733).

Petitioner's involvement in the killing of Henry was also demonstrated by evidence gleaned from Petitioner's bar. Linda Luke, trace evidence expert in the Cuyahoga County Coroner's Office, found blood splatters at Petitioner's bar on a mirrored panel and wooden paneling. (Tr. 3676). The blood splatters were consistent with Henry's blood type and enzyme make up. (Tr. 3684). Luke also used photographic enlargements to show the shape of the blood splatters. From these enlargements and a to-scale reconstruction of the paneling, it was determined that the blood splattered at a high velocity and at a height consistent with Henry's. Additionally, physical evidence found with Henry's body was similar to items found in Petitioner's bar. The pool table covering was missing from Petitioner's pool table and Henry's body was wrapped in green felt like covering. (Tr. 3665, 3701, 3712). Paint chips found on Henry's scalp hair were similar to paint in Petitioner's bar. (Tr. 3653).

At trial, Petitioner testified on his own behalf. While making no effort to explain the $500 which he had extorted from McLean, Petitioner characterized the $6,500 he received from Toney was an "investment." (Tr. 4840). On cross-examination, Petitioner admitted no loan papers had been signed and no liquor license papers involved Toney's name. (Tr. 4885-4886). The "investment" fell through and Petitioner used the $6,500 to pay attorney fees arising from a "little problem in East Cleveland with Judge Devine to get a [Smith and Wesson .38 caliber] firearm back." (Tr. 4845). Petitioner described his meetings with Dimple and Toney as social

occasions. (Tr. 4848, 4889).

Petitioner further testified the police roughed him up and falsely attributed oral statements to him. (Tr. 4863-4865). On cross-examination, Petitioner admitted the police never physically touched him. (Tr. 4872). Petitioner claimed that Toney, McLean and Higgins were liars and the statement made by Allen was a lie. (Tr. 4892, 4917, 4918, 4926).

ARGUMENT

I. NO CONFLICT CURRENTLY EXISTS AMONG THE CIRCUITS WITH RESPECT TO THE HARMLESS ERROR STANDARD THAT IS TO BE APPLIED IN FEDERAL HABEAS REVIEW.

In Brecht v. Abrahamson, ___ U.S. ___, 113 S. Ct. 1710 (1993), this Court recently held that a habeas corpus petitioner bears the burden of demonstrating that a trial court's error has substantial and injurious effect or influence in determining the jury's verdict such that it results in actual prejudice. In his brief Petitioner contends that a "conflict" exists because in Ordndorff v. Lockhart, 998 F.2d 1426 (8th Cir. 1993), the Eighth Circuit Court of Appeals applied the Chapman v. California, 386 U.S. 18 (1967) harmless error standard in a factually similar situation to the case at bar. However, even a cursory review of Ordndorff shows Petitioner to be in error.

In Orndorff a capital defendant discovered after he had pursued an appeal to the Arkansas Supreme Court that the key prosecution witness had been hypnotized prior to trial in an attempt to enhance her memory. For the sole reason that "the state courts did not have the opportunity to review the error at all" Id. at 1430, the Eighth Circuit applied the Chapman harmless error standard.

Unlike Orndorff, the above procedural summation of this case reflects that the Ohio appellate courts unanimously considered and rejected Petitioner's jury instruction claim on the merits. See, Appendix to Petitioner's Certiatori petition at A108 - A109. Under these circumstances no conflict whatsoever exists among the

circuits as to the appropriateness of the Brecht v. Abrahamson harmless error standard.

II. ALTHOUGH IT IS NOT DETERMINATIVE IN THE CASE AT BAR, BRECHT V. ABRAHAMSON PLACES THE BURDEN OF PROVING HARMLESS ERROR ON THE PETITIONER.

Petitioner next claims that there is a conflict within the Sixth and other circuits as to who has the burden of proving a constitutional error to be harmless.[3] In Brecht, this Court explicitly placed the burden of proving that a constitutional error was harmless upon the inmate as it held,

> The test under Kotteakos is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 328 U.S., at 776, 66 S.Ct., at 1253. Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice."

Brecht at 1722, emphasis added.

In its decision the Sixth Circuit recognized that the trial court's instruction "captured the essence of how a jury might properly infer an aider and abettor or conspirator's purpose to kill as explained by the Ohio Supreme Court." O'Neal at 146-147. As thus demonstrated, the Sixth Circuit's placement of the burden of proving harmless error upon Petitioner was not determinative to its decision. Furthermore it is unnecessary for this Court to

[3] Respondent notes in passing that a rehearing in banc, rather than this Court, is the proper means by which to settle a conflict within a circuit.

grant certiorari just to restate the burden of proving harmless error which it articulately set forth in Brecht. Petitioner's second argument for granting certiorari is meritless.

III. THE SIXTH CIRCUIT CORRECTLY APPLIED THE STANDARD OF REVIEW SET FORTH IN ESTELLE V. MCGUIRE, ____U.S.____, 112 S.Ct. 475 (1991) IN ITS EVALUATION OF PETITIONER'S INSTRUCTION CLAIM.

As his third ground for granting certiorari Petitioner complains that the Sixth Circuit retroactively applied Lockhart v. Fretwell, ____U.S. ___, 113 S.Ct. 838 (1993). The first problem with this argument is that the Sixth Circuit does not even mention Lockhart v. Fretwell, let alone use it as the basis of its holding that the district court had relied upon the wrong test for evaluating Petitioner's instruction claim.

Moreover, the Sixth Circuit's finding that the district court employed an outdated standard for evaluating Petitioner's instruction claim is eminently correct. As observed by the Sixth Circuit:

> The district court incorrectly relied upon the test espoused in Francis v. Franklin, 471 U.S. 307, 315-16 (1985), and Sandstrom, 442 U.S. at 514, and followed by this court in Clark v. Jago, 676 F.2d 1099, 1102 (6th Cir. 1982), cert. denied, 466 U.S. 977 (1984), that jury instructions infringe a defendant's due process rights if a reasonable jury could have interpreted the instruction as unconstitutionally shifting the burden of proof. However, after reviewing its sometimes inconsistent articulations of the test, the Surpeme Court settled on a single standard of review for jury instructions; "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way'

> that violates the Constitution." Estelle v. McGuire, 112 S.Ct. 475, 482 & n.4 (1991) (emphasis added) (quoting Boyde v. California, 494 U.S. 370, 380 (1990)).

O'Neal at 145. As thus demonstrated, unlike the district court which ignored this Court's Estelle v. McGuire dictates, the Sixth Circuit applied the correct standard of review for Petitioner's instruction claim. Petitioner's assertion that the Sixth Circuit retroactively applied the inappropriate standard of Lockhart v. Fretwell is both factually and legally incorrect.

IV. THE SIXTH CIRCUIT'S DECISION IS EXPLICITLY PREDICATED UPON A CAREFUL COLLECTIVE REVIEW OF PETITIONER'S CONSTITUTIONAL ALLEGATIONS.

Petitioner's final ground for certiorari contends that the Sixth Circuit failed to review his constitutional allegations collectively. Once again Petitioner appears to have misread the Sixth Circuit's decision which, in fact, considered and rejected Petitioner's assertion that the combined effect of trial "errors" constituted a "structual defect". Indeed, as reflected by the following, the Sixth Circuit explicitly held that Petitioner's constitutional allegations collectively asserted, at most, errors of state law which would not be actionable in federal habeas corpus:

> The district court also held that several rulings of the trial court on the admission of prejudicial evidence, together with the prosecutor's inflammatory closing remarks, deprived petitioner of a fundamentally fair trial. After a careful review of the record, we conclude that these errors were not of constitutional dimension, but were at most errors in the application of state law. As the decisions of both the Supreme Court and this circuit make clear, "federal habeas corpus relief does not lie for errors of state

> law" because "it is not the province of a federal habeas court to reexamine state court determines on state law questions." E.G., Estelle, 112 S.Ct. at 480; Walker v. Engle, 703 F.2d 959, 962 (6th Cir.), cert. denied, 464 U.S. 951 (1983). Under federal constitutional standards, the trial court's evidentiary rulings and the prosecutor's comments were not so prejudicial, either individually or in combination, that they rendered petitioner's trial fundamentally unfair.

O'Neal at 145. As thus reflected, Petitioner's habeas corpus allegations were accorded the precise collective review to which Petitioner feels they were entitled. Although Petitioner may be disappointed at the appellate court's rejection of these claims, the Sixth Circuit's opinion provides no support whatsoever for Petitioner's assertion that the consideration accorded his claims was constitutionally deficient. Petitioner's final ground for certiorari is therefore unworthy of this Court's attention.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner has failed to raise an issue deserving of review by this Court. Therefore, the petition for writ of certiorari must be denied.

Respectfully submitted,

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On Petition For Writ Of Certiorari To The
United States Court of Appeals
For The Sixth Circuit

CERTIFICATE OF SERVICE

I, Timothy J. Mangan, counsel of record for respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 23rd day of February, 1994, I served a copy of Respondent's Brief In Opposition To Petition on each of the parties to this action by mailing such copy in duly addressed envelope, with first-class postage prepaid, to Thomas R. Wetterer, Jr., Assistant State Public Defender, Ohio Public Defender Commission, 8 East Long Street, 11th Floor, Columbus, Ohio 43215-3428.

TIMOTHY J. MANGAN
Assistant Attorney General

Attorney General
Lee Fisher

February 23, 1994

Clerk
Supreme Court of the United States
One First Street
Washington, D.C. 20543

Re: O'Neal v. Morris
Case No. 93-7407

Dear Sir:

Enclosed please find the original and twelve co Respondent's Brief in Opposition to Petition which is to with the Court in the above-captioned case.

Also enclosed is a cover page which we ask you to ti and return in the envelope provided.

Your assistance in this matter is greatly appreciate

Sincerely,

LEE FISHER
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SAC:dd
Enclosure

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